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**TITLE 326 AIR POLLUTION CONTROL BOARD****FIRST NOTICE OF COMMENT PERIOD**

LSA Document #08-817

**DEVELOPMENT OF NEW RULES CONCERNING NITROGEN OXIDE AND SULFUR DIOXIDE EMISSIONS FROM FOSSIL FUEL-FIRED POWER PLANTS****PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on new rules concerning nitrogen oxide and sulfur dioxide emissions from fossil fuel-fired power plants; amendments to [326 IAC 10-4](#) to address Phase II ozone season NO<sub>x</sub> reductions; and repeal of rules at [326 IAC 24-1](#) and [326 IAC 24-2](#) that implement the federal Clean Air Interstate Rule (CAIR) in Indiana. IDEM seeks comment on the affected citations listed and any other provisions of Title 326 that may be affected by this rulemaking.

**CITATIONS AFFECTED:** [326 IAC 10-4](#); [326 IAC 24-1](#); [326 IAC 24-2](#); [326 IAC 24-5](#); [326 IAC 24-6](#).

**AUTHORITY:** [IC 13-14-8](#); [IC 13-17-3-1](#); [IC 13-17-3-4](#).

**SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING****Basic Purpose and Background**

On July 11, 2008, the District of Columbia (D.C.) Circuit Court of Appeals issued an opinion vacating the Clean Air Interstate Rule (CAIR) promulgated by the United States Environmental Protection Agency (U.S. EPA) on May 12, 2005 (70 FR 25162). Power plants affected by CAIR are fossil fuel-fired electric generating units (EGUs) greater than 25 megawatts in 28 states plus the District of Columbia. The CAIR required states to either adopt the CAIR model rules to implement three cap and trade programs for EGUs or develop an alternative rule that would meet the emission caps through nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) reductions from EGUs and other sources. IDEM chose to regulate EGUs using the federal cap and trade model rule with amendments to allow the NO<sub>x</sub> SIP Call nonelectric generating units (non-EGU) sources from [326 IAC 10-4](#) to continue to participate in the CAIR NO<sub>x</sub> ozone season trading program. IDEM adopted CAIR into state rules at [326 IAC 24-1](#) through [326 IAC 24-3](#) with an effective date of February 25, 2007.

As court proceedings progress, the vacatur is not in effect and CAIR is still in place. Petitions for rehearing have been filed and could result in an outcome that would allow portions of CAIR to remain in place, for example, a partial vacatur or remand. Any vacatur of CAIR will become effective when the D.C. Circuit Court of Appeals issues a mandate of the rule thus affecting the current state rules. For instance, the total vacatur of CAIR, with its interstate cap and trade program, would render the current state rules at [326 IAC 24-1](#) and [326 IAC 24-2](#) unworkable. In addition, as part of implementing CAIR, Indiana added sunset language to its existing NO<sub>x</sub> SIP Call rules at [326 IAC 10-4](#) and adopted a CAIR NO<sub>x</sub> ozone season trading program at [326 IAC 24-3](#). A vacatur of CAIR would require IDEM to reinstate the NO<sub>x</sub> SIP Call rule, which will be addressed in a separate rulemaking.

Given the possibility of CAIR being vacated, Indiana needs to be prepared to achieve emissions reductions that would have been achieved under CAIR with a CAIR replacement rule. Indiana is required to meet past due and upcoming federal requirements and to improve air quality in Indiana in the interest of public health. Therefore, IDEM proposes new rules to achieve emissions reductions that would have been achieved under the current state rules with an Indiana CAIR replacement rule. It is also possible that the current state rules could be significantly amended to achieve the same result.

In considering a control program for EGUs that can be deemed "equivalent" to current state rules, it is important to revisit the intended purpose of those rules. Indiana's current CAIR rules serve several purposes:

- Addressing Indiana's interstate transport contribution to downwind areas for ozone and fine particles, whereby meeting the Section 110(a)(2)(D) of the Clean Air Act state implementation plan (SIP) requirements for Indiana.
- Serving as the backbone for Indiana's attainment strategy for the ozone and fine particle standards. SIPs were due on April 5, 2008, and, if the U.S. EPA determines that the SIP is invalid, IDEM could be placed on a sanction clock with timed imposition of federal sanctions by the end of 2008.
- Serving as reasonably available control technology (RACT) for the annual PM<sub>2.5</sub> standard where EGUs located in ozone and fine particle nonattainment areas and for those EGUs in attainment areas found to contribute to continued violations within a nonattainment area.
- Addressing a significant portion of Indiana's contribution to Class 1 areas for regional haze purposes thereby serving as best available retrofit technology (BART) for EGUs.
- Helping Indiana to meet the annual and 24-hour PM<sub>2.5</sub> National Ambient Air Quality Standards (NAAQS), as well as the new eight-hour 0.075 ppm ozone NAAQS.

If the current state rules at [326 IAC 24-1](#) and [326 IAC 24-2](#) are rendered unworkable by a vacatur of CAIR,

Indiana is still obligated to meet all of these requirements and is not in a position to do so without a control program relatively equivalent to the current state rules in place as quickly as possible. If the vacatur of CAIR is mandated, the U.S. EPA will have to start drafting a new federal rule. IDEM will evaluate the Indiana CAIR replacement rule for possible repeal once a new federal rule is in place.

In the interim, in order to achieve NO<sub>x</sub> and SO<sub>2</sub> emissions reductions that would have been achieved by the current state CAIR rules, IDEM is proposing a replacement rule that would reestablish NO<sub>x</sub> and SO<sub>2</sub> annual allowance emissions budgets based on what a unit would have received in conjunction with Phase I and Phase II of CAIR. The Indiana CAIR replacement rule would be contingent upon the issuance of a court mandate vacating CAIR. The Indiana replacement rule would have two phases with the Phase I emissions budget starting in 2009 for NO<sub>x</sub> and 2010 for SO<sub>2</sub> and the Phase II emissions budget starting in 2015. Indiana's annual budgets in the CAIR rule are 108,935 tons (Phase I) and 90,779 tons (Phase II) for NO<sub>x</sub> and 254,599 tons (Phase I) and 178,219 tons (Phase II) for SO<sub>2</sub>. The CAIR replacement rule would also establish a Phase II NO<sub>x</sub> budget for the ozone season. IDEM intends to preserve the components of the current Indiana CAIR rule, including, but not limited to, new unit set-aside, energy efficiency/renewable energy set-aside, and allocation methodology. The flexibility provisions that IDEM has identified so far for the CAIR replacement rule are:

- Source-wide and intrastate system emissions averaging for units operated under common ownership.
- Multiyear emissions averaging plan or compliance agreement/order (Phase I only). An emissions averaging plan involves demonstrating compliance by averaging emissions over a portion of Phase I only (two to three year span). A compliance agreement/order would be based on a plan prepared by the source that demonstrates how compliance will be achieved at a specified point in time. Both of these would be in the form of a legally enforceable agreement with IDEM.
- Intrastate and interstate emissions reduction credit tradeoff. Sources could enter into agreements with sources in Indiana or other states to use credits that correlate to tons reduced from their emissions reductions. An Indiana certification statement would be required to ensure reductions attained elsewhere are:
  - Realized in conjunction with a specified baseline within an eligible state.
  - Not used as credits to satisfy a separate legal or regulatory obligation.

IDEM will also propose an emergency rule to the Air Pollution Control Board that puts in place these emissions budgets for 2009 and 2010 in advance of completing this rulemaking. As with this rulemaking, the emergency rule would be contingent upon the issuance of a court mandate vacating CAIR.

IDEM invites comments and suggestions on this proposal to move forward with a CAIR replacement rule including the implementation of the flexibility provisions, how budgets should be developed for each unit/source (allocation methodology and set-asides), and other regulatory options.

#### **Alternatives to Be Considered Within the Rulemaking**

Alternative 1. Develop rule as proposed in background section.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No. It is not an incorporation of federal standards, but this rule provides standards that need to be in place to meet federal requirements.
- Is this alternative imposed by federal law or is there a comparable federal law? This rule is a "state-only" requirement that is necessary to meet federal requirements, that is, attainment standards.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

Alternative 2. Do not proceed with rulemaking.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? No, but IDEM will not be able to attain the NAAQS and alternative requirements would need to be put in place.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

#### **Applicable Federal Law**

Section 110(a)(2)(D) SIP- Interstate Transport

Under Section 110(a)(1) of the Clean Air Act (CAA), each jurisdiction listed in paragraph (c) of the section must submit a SIP revision to comply with the requirements of section 110(a)(2)(D)(i)(I) through the adoption of adequate provisions prohibiting sources and other activities from emitting NO<sub>x</sub> and SO<sub>2</sub> in amounts that will contribute significantly to nonattainment in, or interfere with maintenance by, one or more other states with respect to the eight-hour ozone and fine particles NAAQS.

40 CFR Part 51 Implementation Rule for Fine Particles

- (1) 40 CFR 51.1004: Attainment deadline for areas designated nonattainment is April 5, 2010.
- (2) 40 CFR 51.1002: For any area designated by the U.S. EPA as nonattainment for the PM<sub>2.5</sub> NAAQS, the state must submit a SIP by the date prescribed by the U.S. EPA, which will be not later than three years from the date of designation (April 5, 2008).
- (3) 40 CFR 51.1010: For each PM<sub>2.5</sub> nonattainment area, the state shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all reasonably available control measures

(RACM), including reasonably available control technology (RACT) for stationary sources, necessary to demonstrate attainment as expeditiously as practicable. The SIP revision shall contain the list of the potential measures considered by the state. Due on April 5, 2008.

#### 40 CFR Part 51: Regional Haze Program Requirements

(1) 40 CFR 51.308(e): The state must submit an implementation plan containing emission limitations representing best available retrofit technology (BART) and schedules for compliance with BART for each BART-eligible source that may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I federal area, unless the state demonstrates that an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions. Due on December 17, 2007.

(2) 40 CFR 51.308(d)(3): Each state listed in 40 CFR 51.300(b)(3) must submit a long-term strategy that addresses regional haze visibility impairment for each mandatory Class I federal area within the state and for each mandatory Class I federal area located outside the state that may be affected by emissions from the state. The long-term strategy must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by states having mandatory Class I federal areas. The implementation plan is required to be revised every 10 years thereafter.

(3) 40 CFR 51.308(e)(4): A state that chooses to meet the emission reduction requirements of CAIR by participating in one or more of the U.S. EPA-administered CAIR trading programs for SO<sub>2</sub> and NO<sub>x</sub> need not require BART-eligible EGUs subject to such trading programs in the state to install, operate, and maintain BART for the pollutants covered by such trading programs in the state. A state may choose to participate in the U.S. EPA-administered CAIR trading programs either by submitting a SIP that incorporates the CAIR model trading rules in 40 CFR 96 or by remaining subject to the federal implementation plan in 40 CFR 97. A state that chooses to participate in such trading programs may also adopt provisions, consistent with such trading programs, for a geographic enhancement to the program to address the requirement under 40 CFR 51.302(c) related to BART for reasonably attributable impairment from the pollutants covered by the CAIR cap-and-trade programs.

#### 8-Hour Ozone Attainment SIP

40 CFR 51.908(b): An area subject to 40 CFR 51.902(b) shall be subject to the attainment demonstration under Section 172(c)(1) of the Act and shall submit an attainment demonstration not later than three years after the area's designation for the eight-hour NAAQS. Due on June 15, 2007.

#### Potential Fiscal Impact

Potential Fiscal Impact of Alternative 1. IDEM had estimated that the Indiana CAIR rulemaking promulgated in 2007 would cost approximately \$1 billion on an annual basis after Phase II budgets were in place. The cost of this CAIR replacement rulemaking will likely be greater than this cost due to the loss of a robust trading market but will depend on the flexibility provisions that are included in the final rule. IDEM invites comments on the cost of this rulemaking and suggestions on ways the cost of the rule can be minimized. IDEM has developed preliminary estimates for the cost of this rulemaking. The estimated costs for Phase I are:

SO<sub>2</sub>

Capital cost = \$3 billion

Annual cost = \$706 million

NO<sub>x</sub>

Annual cost of SCR/SNCR extended operation = \$48 million

Retrofit control capital cost = \$457 million

Retrofit control annual cost = \$100 million

SCR = selective catalytic reduction

SNCR = selective noncatalytic reduction

The costs are based on U.S. EPA data. The costs were estimated using Phase I projected emissions; CAIR Phase I NO<sub>x</sub> allocations made to utilities (which exclude set asides); and SO<sub>2</sub> allocations equal to 50% of the acid rain allocations to coal-fired utilities. The costs include the costs of retrofit controls expected to come online in 2006 and through Phase I. The costs are based on compliance with the application of retrofit controls only. Sources have other alternatives to comply with their budget, such as fuel switching or shutting down high emitting and uneconomic units, which have not been considered in these estimates.

Potential Fiscal Impact of Alternative 2. This alternative has no direct cost.

#### Small Business Assistance Information

IDEM established a compliance and technical assistance (CTAP) program under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at:

[www.in.gov/idem/compliance/ctap/index.html](http://www.in.gov/idem/compliance/ctap/index.html)

Small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Alison Surface  
IDEM Compliance and Technical Assistance Program - OPPTA  
MC 60-04 IGCS W041  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 232-8172 or (800) 988-7901  
ctap@idem.in.gov

The Small Business Assistance Program Ombudsman is:  
Megan Tretter  
IDEM Small Business Assistance Program Ombudsman  
MC 50-01 - IGCN 1307  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 234-3386  
mtretter@idem.in.gov

### **Public Participation and Workgroup Information**

External workgroup meetings will be held to share information regarding this rulemaking. Information for the workgroup and this rulemaking will be distributed electronically. If you are not already on the e-mail distribution list for utility rulemakings, please contact the person identified in the next paragraph.

If you wish to provide comments to the workgroup on the rulemaking, attend meetings, or have suggestions related to the workgroup process, please contact Susan Bem, Rules Development Section, Office of Air Quality at (317) 233-5697 or (800) 451-6027 (in Indiana) or by e-mail at sbem@idem.in.gov. Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the workgroup who represent their particular interests in the rulemaking.

### **STATUTORY AND REGULATORY REQUIREMENTS**

[IC 13-14-8-4](#) requires the board to consider the following factors in promulgating rules:

- (1) All existing physical conditions and the character of the area affected.
- (2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
- (3) Zoning classifications.
- (4) The nature of the existing air quality or existing water quality, as the case may be.
- (5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
- (6) Economic reasonableness of measuring or reducing any particular type of pollution.
- (7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.

### **REQUEST FOR PUBLIC COMMENTS**

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
- (2) The submission of suggestions for the development of draft rule language.
- (3) The submission of comments on the cost of this rulemaking.

Mailed comments should be addressed to:

#08-817(APCB) CAIR Replacement Rule  
Susan Bem Mail Code 61-50  
c/o Administrative Assistant  
Rules Development Section  
Office of Air Quality  
Indiana Department of Environmental Management  
100 North Senate Avenue  
Indianapolis, Indiana 46204

Hand delivered comments will be accepted by the IDEM receptionist on duty at the tenth floor reception desk, Office of Air Quality, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 233-2342, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules Section at (317) 233-0426.

### **COMMENT PERIOD DEADLINE**

Comments must be postmarked, faxed, or hand delivered by November 21, 2008.

Additional information regarding this action may be obtained from Susan Bem, Rules Development Section, Office of Air Quality, (317) 233-5697 or (800) 451-6027 (in Indiana).

Scott Deloney, Chief  
Air Programs Branch  
Office of Air Quality

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